

1 WRITTEN DECISION - NOT FOR PUBLICATION

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3 ENTERED 8/4/09

4 FILED

5 AUG 4 2009

6 CLERK, U.S. BANKRUPTCY COURT

7 SOUTHERN DISTRICT OF CALIFORNIA

8 BY 144 DEPUTY

9 UNITED STATES BANKRUPTCY COURT

10 SOUTHERN DISTRICT OF CALIFORNIA

11 In re) Case No. 05-14335-PB7

12 JED PARSEE,) Adv. No. 07-90193

13 Debtor.) ORDER ON MOTION FOR

14) PARTIAL SUMMARY JUDGMENT

15 UNITED STATES TRUSTEE,)

16 Plaintiff,)

17 v.)

18 JED PARSEE,)

19 Defendant.)

20)

21 The United States Trustee filed an adversary complaint

22 seeking to deny debtor a discharge on multiple grounds. After

23 lengthy discovery, the United States Trustee brought the current

24 motion for partial summary judgment, assenting that debtor should

25 be denied a discharge 1) under § 727(a)(3) for failure to keep

26 or preserve sufficient recorded information about debtor's

1 financial condition or transactions; and 2) under § 727(a)(5)
2 for failure to satisfactorily explain or account for a diminution
3 of assets.

4 This Court has subject matter jurisdiction over this
5 proceeding pursuant to 28 U.S.C. § 1334 and General Order
6 No. 312-D of the United States District Court for the Southern
7 District of California. This is a core proceeding under
8 28 U.S.C. § 157(b)(2)(J).

9 Definitive guidance on assessing causes of action under
10 § 727(a)(3) was provided by the Ninth Circuit Court of Appeals
11 in Lansdowne v. Cox, 41 F.3d 1294 (1994), and more recently in
12 In re Caneva, 550 F.3d 755 (2008). Caneva provides the matrix
13 against which the United States Trustee's present claim under
14 § 727(a)(3) should be measured. Consequently, that guidance
15 is set out in some detail.

16 Section 727(a) of the Bankruptcy Code
17 provides that a debtor is entitled to
18 discharge unless one of eight conditions is
19 met. . . . Under 11 U.S.C. § 727(a)(3), the
20 court shall grant the discharge unless:

21 the debtor has concealed, destroyed,
22 mutilated, falsified or failed to keep
23 or preserve any recorded information,
24 including books, documents, records, and
25 papers, from which the debtor's
26 financial condition or business
27 transactions might be ascertained,
28 unless such act of failure to act was
29 justified under all the circumstances of
30 the case.

31 We have stated that the purpose of 727(a)(3)
32 is to make discharge dependent on the
33 debtor's true presentation of his financial
34 affairs. Cox, 41 F.3d at 1296 (citation

1 omitted). The disclosure requirement removes
2 the risk to creditors of "the withholding or
3 concealment of assets by the bankrupt under
4 cover of a chaotic or incomplete set of books
5 or records." [Citation omitted.] The statute
6 does not require absolute completeness in
7 making or keeping records [Citation omitted.]
8 Rather, the debtor must "present sufficient
9 written evidence which will enable his
10 creditors reasonably to ascertain his present
11 financial condition and to follow his
12 business transactions for a reasonable period
13 in the past." Id. . . .

8 A creditor states a prima facie case
9 under § 727(a)(3) by showing "(1) that the
10 debtor failed to maintain and preserve
11 adequate records, and (2) that such failure
12 makes it impossible to ascertain the debtor's
13 financial condition and material business
14 transactions.'" [Citations omitted.] After
15 showing inadequate or nonexistent records,
16 "the burden of proof then shifts to the
17 debtor to justify the inadequacy or
18 nonexistence of the records."

14 550 F.3d at 761.

15 Caneva argued that he had produced a lot of records, while
16 admitting that he produced none as to several of his business
17 entities and one large transaction. In addition, he argued that
18 at least some of what the objecting creditor wanted to see was
19 available from alternative sources. In rejecting those
20 arguments, the Ninth Circuit observed:

21 The Seventh Circuit has held that § 727(a)(3)
22 "places an affirmative duty on the debtor to
23 create books and records accurately
24 documenting his business affairs." [Citations
25 omitted.] The court also noted that when a
26 debtor is sophisticated and carries on a
business involving substantial assets,
"creditors have an expectation of greater and
better record keeping" . . . Caneva has
asked Sun, the bankruptcy and district court,
and now this court to disregard the

1 affirmative duty that § 727(a)(3) imposes on
2 a debtor to keep and preserve records, take
3 him at his word that he has no records
4 because there was nothing to record, and
5 focus instead on what might be learned from
6 the boxes of records he did keep and
7 eventually offered to the bankruptcy court.
8 In other words, he says that if there is a
9 needle in this haystack, it is up to the
10 court to find it. . . .

11 As the Third Circuit has stated
12 "[c]omplete disclosure is in every case a
13 condition precedent to the granting of the
14 discharge, and if such a disclosure is not
15 possible without the keeping of books or
16 records, then the absence of such amounts to
17 that failure to which the act applies.'" [Citations omitted.] Without the records that
18 Caneva admitted he did not keep, Sun cannot
19 determine what assets his business entities
20 held or may still hold, what assets passed
21 through them and where they might have gone,
22 and what their present value is, if anything.
23 Without any documentation related to the
24 payment to Bowden, Sun cannot determine the
25 details of that transaction or verify that it
26 actually took place.

550 F.3d at 762.

The requirements for a cause of action under § 727(a)(5)
follow a similar line of reasoning. An intent to defraud is not
required. In re Carter, 236 B.R. 173 (Bankr. E.D. PA 1999).
The purpose, like § 727(a)(3), is to require full disclosure and,
while (a)(3) is to aid creditors in understanding the debtor's
financial situation, (a)(5) requires the debtor to provide the
explanation.

Finally, Rule 56, Federal Rules of Civil Procedure, is made
applicable in Bankruptcy proceedings through Rule 7056, Federal
Rules of Bankruptcy Procedure and provides in relevant part: "The

1 judgment sought should be rendered if the pleadings, the
2 discovery and disclosure materials on file, and any affidavits
3 show that there is no genuine issue as to any material fact and
4 that the movant is entitled to judgment as a matter of law."
5 While the movant has the burden of establishing that no material
6 fact exists, if the moving party does so, the non-moving party
7 cannot simply rely on denials in its answer to the complaint or
8 otherwise, but must show there is a genuine issue of material
9 fact which requires resolution by trial. Anderson v. Liberty
10 Lobby, Inc., 477 U.S. 242 (1986).

11 12 Discussion

13 The United States Trustee invested significant effort in
14 trying to gather information from debtor and third parties that
15 would aid that office in understanding debtor's financial
16 activities. Over the intervening period, bits and pieces of
17 information floated to the surface which primarily added to the
18 confusion. In this motion, the United States Trustee has focused
19 on debtor's relationship to Chase Auto Credit, which was a used
20 car dealership on Mission Gorge Road, San Diego. According to
21 documents provided, Chase was, at least initially, owned 99% by
22 Mared in Texas, and 1% by debtor. Debtor also served as its
23 president and CEO. The business site was leased, initially in
24 the name of Chase, then in debtor's name. At various times,
25 debtor has contended he was just an employee of Chase, and that
26 all the books and records were in the hands of an accountant in

1 Texas. Despite those assertions, debtor has claimed that he
2 personally made loans to Chase, usually to buy cars. However,
3 the only documents debtor produced to support those claims were
4 checks. Moreover, he also claimed he made a number of cash loans
5 for the same purpose. However, there are no loan documents
6 setting out amounts, repayment terms, interest rates, due dates,
7 or anything else. Further, in the roughly five months between
8 March 7, 2005 through August 10, 2005, Debtor received payments
9 of approximately \$60,000 from Chase, according to debtor's own
10 testimony. Since there are no documents explaining what those
11 checks were for, and assuming for purposes of the instant
12 discussion that at least some were payments of salary at \$3,000
13 per month (as debtor has claimed), \$42,000 - \$45,000 represents
14 something else that debtor was paying to himself from Chase's
15 account. But even though debtor wrote the checks payable to
16 himself, he has no documents to explain what they were for, how
17 much he was owed, for what, and what any adjusted balance might
18 be. In his later revision of his schedules, debtor claimed Chase
19 owed him over \$100,000 in salary and loan debts. Again, no
20 documentation has been provided. Further muddying the question
21 of debtor's relationship with Chase is that he loaned Chase -
22 according to his testimony - \$10,000 in December, 2004 and
23 \$50,000 in January, 2005. Moreover, when he stopped operating
24 Chase, he purported to sell it to Good Guys for a net of \$40,000
25 - \$50,000, post-petition, and used the proceeds for his own
26 purposes. In addition, as sub-lessor debtor leased the Mission

1 Gorge site to Good Guys for more than he was obligated to pay
2 monthly. No records have been provided by debtor to show how
3 those funds were handled as between debtor and Chase.

4 At the center of the issue is debtor's contention that he
5 made loans to Chase, on no apparent terms, then repaid himself
6 as and when he saw fit, with the only documentation being
7 processed checks without useful annotations. The Court finds
8 and concludes that the United States Trustee has established a
9 prima facie case that debtor failed to make, keep or preserve
10 documents which one would expect to exist under the circumstances
11 of the multiple business dealings debtor was supposedly
12 conducting, including the nature and size of the amounts
13 involved.

14 The burden thus shifts to the debtor to show there is a
15 genuine issue of material fact in order to defeat the current
16 motion. Debtor's response, however, is very much like that of
17 the debtor in Caneva. In Caneva, the debtor testified that as
18 to certain businesses there were no documents because the
19 entities did little or no transactions. Further, as to a
20 \$500,000 fee payment made by debtor there were also no documents.
21 Here, the only documents are processed checks, and we are left
22 with debtor's occasional recollection of what each check might
23 have been for and where the proceeds went. Those checks, and
24 debtor's uncorroborated occasional explanation do not create a
25 genuine issue of material fact requiring a trial to resolve it.
26 Accordingly, the United States Trustee's motion for summary

1 judgment as to the § 727(a)(3) cause of action shall be, and
2 hereby is granted.

3 The Court notes in passing, as it has explained in court,
4 that a creditor is not required to show that a debtor defrauded
5 or intended to defraud or deceive. Rather, as already discussed,
6 a discharge of debt is a privilege earned by the disclosure of
7 the amount and kind of information that would enable a creditor
8 to understand a debtor's financial dealings, unless the
9 circumstances would allow the conclusion that the absence of
10 such information was justified. Here, given the nature of the
11 business operated by the debtor, his role as president and CEO,
12 the size, volume and nature of the transactions between he and
13 chase require substantially more recorded information than he has
14 provided and no sufficient justification for the failure has been
15 proffered.

16 As already noted, the United States Trustee also seeks
17 summary judgment on its cause of action under § 727(a)(5).
18 Because of the Court's findings and conclusions as to
19 § 727(a)(3), the Court need not reach and decide the § 727(a)(5)
20 in this summary judgment content.

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Conclusion

For the foregoing reasons, the Court grants the United States Trustee's motion for partial summary judgment as to the § 727(a)(3) cause of action. Because of that holding, the Court expresses no opinion on the motion as to the § 727(a)(5) cause of action.

Because the Court's ruling resolves less than all the claims pending in the complaint brought by the United States Trustee, a status conference will be noticed to both parties to discuss proceeding on the remainder of the complaint.

IT IS SO ORDERED.

DATED: AUG -4 2009



PETER W. BOWIE, Chief Judge
United States Bankruptcy Court